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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 223

FAIRVIEW PUBLIC UTILITY DISTRICT, No. 1, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, PAULINE TRUEX,

Appellants,

vs.

CITY OF ANCHORAGE, a municipal corporation,

Appellees

LAWRENCE E. HAWK, et al,

Appellants,

vs.

FAIRVIEW PUBLIC UTILITY DISTRICT, No. 1 et al; and the CITY OF ANCHORAGE, a municipal corporation,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	4
I. The Appeal Is Not Within The Jurisdiction Of This Court Because Not Taken In Conformity To Statute Or The Rules Of This Court	4
II. Federal Questions Sought To Be Raised Were Not Timely Or Properly Raised In The Court Below	5
III. No Substantial Federal Question Is Presented	5
CONCLUSION	7
APPENDICES:	
I. Constitution of State of Alaska, Article X, Local Government	8
II. 1960 Session Laws of Alaska, Chapter 45	8
III. 1959 Session Laws of Alaska, Chapter 185	10
IV. Map, City of Anchorage Annexation, March 1960	13
V. Appellants' Brief (Supreme Court of Alaska) Case No. 69, April 28, 1961	15
VI. Appellants' Brief (Supreme Court of Alaska) Case No. 71, April 17, 1961	32

Cases:

C.I.O. v. McAdory, 325 U.S. 472	5
Edelman v. California, 344 U.S. 357	5
Gomillion v. Lightfoot, 364 U.S. 339	5
Hunter v. City of Pittsburgh, 207 U.S. 161	6
Kelly v. City of Pittsburgh, 104 U.S. 78	6
Mount Pleasant v. Beckworth, 100 U.S. 514	6
White River Lumber Company v. Arkansas, ex rel., 279 U.S. 692	5

Page

Constitutions:

Alaska Const., Art. X, § 12 3

Statutes:

Federal:

62 Stat. 929, 28 U.S.C. § 1257(2) (1948) 4

State:

Session Laws of Alaska, 1957, Ch. 183 3
Session Laws of Alaska, 1959, Ch. 64 3
Session Laws of Alaska, 1959, Ch. 185 3
Session Laws of Alaska, 1960, Ch. 45 3

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Appellees, City of Anchorage, pursuant to Rule Sixteen of the Revised Rules of this Court, move to dismiss or affirm the appeal in each of the above entitled cases on the grounds:

A. That the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or rule.

B. The federal questions sought to be raised were not timely or properly raised in the state court below.

C. No substantial federal question is presented.

QUESTIONS PRESENTED

1. Whether federal questions which are not raised in the pleadings in the trial court but are mentioned in unspecific broad terms in briefs in the Supreme Court of Alaska can be a basis for review jurisdiction in this Court?

2. Whether, in light of the fact that the Appellants failed to raise any federal questions in the trial court and the arguments raised in the State Supreme Court concerning the right to vote and due process were not ruled upon by the State Supreme Court, the Appellants can now, for the first time, come forward with questions of equal protection and privileges and immunities?

3. Whether annexation of territory to the City of Anchorage by state legislative act deprives residents of the annexed territory of a federally guaranteed right to vote on that annexation?

STATEMENT OF THE CASE

The two cases under consideration are companion appeals from a final judgment and decision of the Supreme Court of the State of Alaska affirming the judgments of the Superior Court of the State of Alaska. They involve annexation of adjacent lands to the City of Anchorage, Alaska.

Two distinct methods for altering the boundaries of political subdivisions have been provided by state

statute; the local petition-election method,[1] and a legislative action procedure as established by constitutional mandate. The latter involves action through the State Legislature upon recommendation of the State Boundary Commission.[2]

During March of 1960, three vestigial islands as illustrated by the map of the City of Anchorage and the Fairview Public Utility District, Appendix IV, *infra*, were annexed to the City of Anchorage by the State Legislature. The procedure does not provide for a vote by the residents. Thereafter, Appellee commenced an action against the Fairview Public Utility District and its Board of Directors for declaratory judgment asking, among other things, that the Court determine the District had been dissolved as a result of the annexation. The companion case of *Hawk, et al* v. *Fairview Public Utility District, No. 1, et al* was commenced by individuals opposing the boundary change and seeking to compel an election in order that new directors for the Fairview Public Utility District might be elected, the terms of the previous board members having expired. The litigation, as developed, centered on the desire of the persons opposing the

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[1] Session Laws of Alaska, 1957, Ch. 183, §16-1-29n, ACLA Cum. Supp. (1959)

[2] Alaska Const. Art. X, §12; Session Laws of Alaska, 1959, Ch. 64 §2A-17, ACLA Cum. Supp. (1959) and Session Laws of Alaska, 1959, Ch. 185. The text of Art. X, Sec. 12 of the Alaska Constitution is misquoted on page 5 of Appellants' Jurisdictional Statement, but is set forth in full in Appendix I, *infra*. Note that while Session Laws of Alaska, 1960, Ch. 45 post-dated this case, and did repeal Session Laws of Alaska, 1959, Ch. 185 as mentioned on page 6 of Appellants' Statement, it also re-enacted the same provisions, both acts being set forth *in full* in Appendix II and III, *infra*.

boundary change to vote on the question of annexation. In this connection, the question of whether the statute providing for annexation on the recommendation of the boundary commission through the state Legislature was operative under the Alaskan Constitution was argued in various cases. The trial court disposed of the two cases together; the statute was found operative as a matter of state law, the dissolution was declared, and the request for an election of a further Board of Directors was denied.

No federal questions were raised in the pleading nor were facts on which to base a federal claim revealed in the trial court; no challenge was made concerning repugnancy of the statute under which the Boundary Commission acted as related to the United States Constitution. On appeal to the Supreme Court of the State of Alaska, "right to vote" was mentioned in argument and lack of "due process" was also mentioned in the briefs.[3] The application of these concepts and facts upon which to base a claimed deprivation, were not presented.

ARGUMENT

I. The Appeal Is Not Within The Jurisdiction Of This Court Because Not Taken In Conformity To Statute Or The Rules Of This Court

Appeal is sought here as of right in reliance upon 62 Stat. 929, 28 U.S.C. §1257(2) (1948), but a direct challenge to the constitutionality of the Statute creating and empowering the Boundary Commission was not properly presented to the state court nor ruled upon by it.[4]

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[3] See Appellants' Brief in State Supreme Court, Case No. 69, at p. 19 and in Case No. 71, at pp. 36-40, Appendices V and VI, *infra*.

[4] Opinion, Appellants' Appendix, pp. 32-34, 39-40.

II. Federal Questions Sought To Be Raised Were Not Timely Or Properly Raised In The Court Below

No federal question was ever mentioned in the Superior Court for the State of Alaska, the first occasion being in argument on appeal to the Alaska Supreme Court where a "right to vote" and "due process" were suggested.[5] *Gomillion* v. *Lightfoot*, 364 U.S. 339 was miscited by Appellants and mentioned by the State Supreme Court only to show its inapplicability. Now, for the first time, questions including privileges and immunities and equal protection are raised, never having been presented for ruling below. This Court in innumerable decisions has held it is too late to raise federal questions for the first time in this Court. *White River Lumber Company* v. *Arkansas, ex rel*, 279 U.S. 692, 699-700; *C.I.O.* v. *McAdory*, 325 U.S. 472, 477; *Edelman* v. *California*, 344 U.S. 357.

III. No Substantial Federal Question Is Presented

The questions presented on page 14 of Appellants' Statement are either not federal, or not substantial. The State Courts have interpreted the State Statutes to provide two different methods for changing boundaries, one by local action one by state action.[6] The State Court has specifically ruled that there is no "right to vote" by the inhabitants of an annexation area when the procedure adopted is the State legislature method, and this ruling is independently supported on state grounds.[7] This has long been recognized as a

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[5] Appellants' Brief in State Supreme Court of Alaska, No. 69 at p. 19 and No. 71 at pp. 36-40, Appendices V and VI, *infra*.

[6] Opinion, Appellants' Appendix, p. 39.

[7] Opinion, Appellants' Appendix, p. 39.

non-federal area in the absence of abuses generally involving the impairment of contracts, economic disadvantage or discrimination.[8] In the instant case no abuses are claimed and none in fact exist. Scattered islands composing the entire Fairview Public Utility District were incorporated into the single surrounding governmental unit.

The provision of the State Constitution when enacted in statutory form cannot seriously be labeled as special legislation or such an unlawful delegation as to raise a federal question. Other purely state questions are also presented and appellants desire this Court to rule that ordinary geographic redistricting cannot be accomplished in the absence of consent of the inhabitants secured through an election. This is a state political question in the classic sense. Because the local petition method incorporates an election procedure and likewise was found operative in a separate proceeding not on appeal here, Appellants conceive a "right to vote" must also attach to the State Legislature method or they will be treated "unequally," and denied "privileges and immunities." These concepts as historically understood do not raise substantial questions when applied to the circumstances of these cases, all persons similarly situated having been treated equally. It is conceded that no racial discrimination occurred; the rights of citizens "not of the negro race" to receive constitutional protection cannot seriously be open to substantial questioning.

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[8] *Kelly* v. *City of Pittsburgh*, 104 U.S. 78; *Hunter* v. *City of Pittsburgh*, 207 U.S. 161; *Mount Pleasant* v. *Beckworth*, 100 U.S. 514.

CONCLUSION

There is no absolute "right to vote" on an ordinary geographic redistricting when the State Statute does not provide for an election. There is no circumvention of a federally protected right, privilege or immunity when a geographical area is unified under a single government subdivision by elimination of islands which compose the entire remainder of the one district, incorporating the islands into a second area. It is a matter of State concern, and the decision is adequately supported on State grounds.

It is respectfully submitted that the appeals should be dismissed.

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APPENDIX I

CONSTITUTION OF THE STATE OF ALASKA: ARTICLE X

LOCAL GOVERNMENT

Section 12. *Boundaries.* A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

APPENDIX II

1960 SESSIONS LAWS OF ALASKA, CHAPTER 45

AN ACT

Relating to the duties and powers of the Local Boundary Commission and procedures for the exercise of those duties and powers; repealing Ch. 185, SLA 1959; and providing for an effective date.

Be it enacted by the Legislature of the State of Alaska:

Section 1. *Purpose.* The purpose of this Act is to establish the duties and powers of the Local Boundary Commission, procedures for the exercise of those duties and powers, and to direct a study for the organization of boroughs and the integration of existing special districts.

Section 2. *Duties and Powers.* The commission has the following duties and powers:

(1) It may conduct meetings and hearings for the purpose of considering local government boundary changes and other matters related to local government boundary changes;

(2) It may present proposed local government boundary changes to the legislature during the first ten days of any regular session. The change shall become effective 45 days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house;

(3) It shall consider any local government boundary change requested of it by the legislature, the director of local affairs, or a political subdivision of the state;

(4) No local government boundary change may be proposed to the legislature unless a hearing on the change has been held in or in the near vicinity of the area affected by the change.

Section 3. *Meetings and Hearings.* a. Meetings and hearings may be called by the chairman of the commission or by the director of local affairs with the concurrence of the chairman.

(1) All meetings and hearings of the commission shall be public.

(2) Minutes shall be kept for all meetings and hearings unless the entire proceedings are transcribed, in which case minutes shall be made from the transcription. All minutes are a matter of public record.

(3) All votes taken by the commission shall be entered in the minutes.

(4) Public notice of any hearing shall be made in the area in which the hearing is to be held at least 15 days before the date of the hearing and the notice shall include the time, date, place and subject of the hearing. The director of local affairs shall give notice of the

hearing at least three times in the press or through other news media or by posting in a public place, whichever is most feasible.

b. Three members of the commission constitute a quorum for the conduct of busines at a meeting and two members constitute a quorum for the conduct of business at a hearing, provided that a majority of the membership of the commission must vote in favor of a proposed boundary change before it may be presented to the legislature.

Section 4. *Pay.* Members of the commission receive no pay but shall receive travel expenses and per diem as is authorized for members of boards and commissions.

Section 5. *Repeal.* Ch. 185, SLA 1959 is repealed.

Section 6. *Effective Date.* This Act takes effect on the day after its passage and approval or on the day it becomes law without such approval.

APPENDIX III

1959 SESSION LAWS OF ALASKA, CHAPTER 185

(Sections 16-7-1, 2, 3, ACLA Cum. Supp., 1959)

AN ACT

Relating to the powers of the Local Boundary Commission; providing for an effective date.

Be it enacted by the Legislature of the State of Alaska:

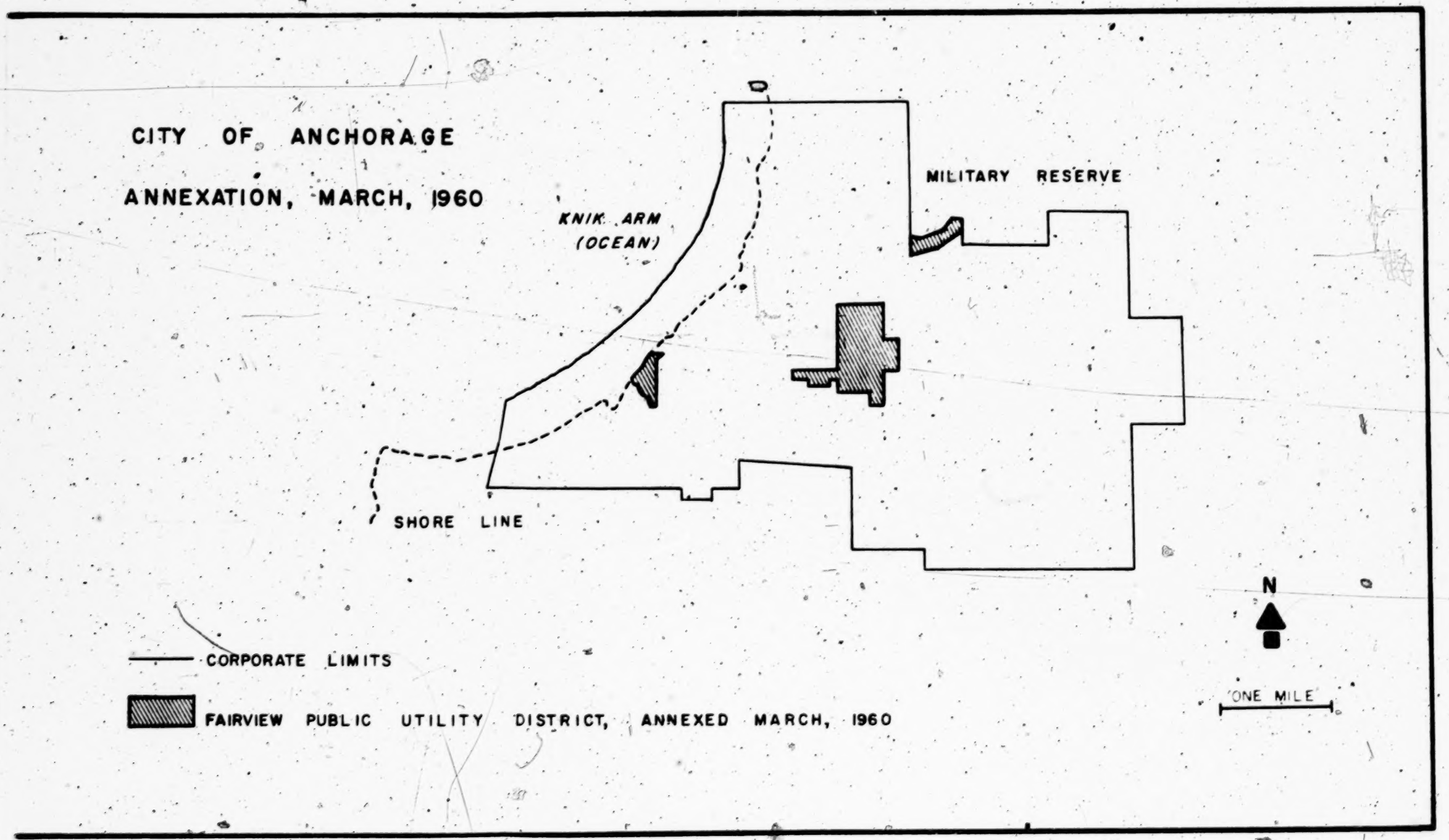
Section 1. *Commission Defined.* The Local Boundary Commission created by the State Organization Act of 1959 is the commission referred to in this Act.

Section 2. *Powers.* The commission may consider any local government boundary or any proposed local government boundary change and exercise such other powers as may be prescribed by law. It shall present proposed local government boundary or local government boundary changes to the legislature during the first ten days of any regular session. The boundary

or boundary change as recommended shall become effective forty-five days after presentation to the legislature or at the end of the legislative session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house of the legislature. Cities shall have such powers regarding boundaries as conferred on them by general law. The commission may recommend to the legislature the procedures whereby a local government boundary may be adjusted by local action.

Section 3. *Meetings; Quorum.* The commission shall meet at such times and such places as may be necessary to carry out the purpose of this Act. A majority of the full membership of the commission shall constitute a quorum to transact business; provided, that it shall take an affirmative vote of the majority of the membership to carry all decisions on proposals.

Section 4. *Effective Date.* This Act shall take effect immediately upon its passage and approval or upon its becoming law without such approval.


CITY OF ANCHORAGE
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FAIRVIEW PUBLIC UTILITY DISTRICT, ANNEXED MARCH, 1960

APPENDIX V

IN THE SUPREME COURT OF THE STATE OF ALASKA

No. 69

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, and PAULINE TRUEX,

Appellants

vs.

CITY OF ANCHORAGE, a municipal corporation,

Appellees

Statement of the Case

This case has been brought to the Supreme Court of the State of Alaska on appeal from the Superior Court, Third Judicial District, Anchorage, Alaska not only as a matter of appeal from an adverse decision, but also as a matter of law in which even the presiding Judge stated that the question should properly be settled in the Supreme Court.

The issue arises from the purported annexation of the area known as the Fairview Public Utility District Number One by the City of Anchorage as of March 20, 1960.

The litigation sets forth the direct conflict between two municipal corporations engaged in an irreconcilable conflict as to which of the two is entitled to exercise proper legal jurisdiction over certain territory.

The complaint filed by the Appellees, hereinafter known as the City of Anchorage, sets forth the fact that the City of Anchorage is a municipal corporation duly organized and existing under the laws of the State of Alaska and the Appellants, hereinafter known as the Board of Directors of the Fairview Public Utility District, Number One, are Board of Directors of a public corporation organized and existing under the laws of the State of Alaska.

The question involves the method of dissolution of

said Public Utility District and quotes certain Sections of the Alaska Compiled Laws Annotated, 1957 Supplement, namely, Section 49-2-13 and Section 16-1-5 as being unworkable because a plurality vote of 3 5's is required, the area in question has already been annexed and therefore doesn't exist, the portion pertaining to U.S. Commissioner's no longer applies since U.S. Commissioners no longer exist and there is no workable statute providing for dissolution.

The Complaint charges the Board of Directors of the Fairview Public Utility District have failed to dissolve the District, and the City of Anchorage, having been charged by law to furnish municipal services to the annexed area, is doing so. By virtue of supplying these services, the City of Anchorage asks for dissolution as a matter of law and that the City of Anchorage be declared the legal successor to all the previous rights and interests of the annexed area, including the disbursement of funds already collected by the Fairview Public Utility District. The City further asks for a date when all the affairs of the annexed area shall be completed and its assets transferred to the City.

The Appellants in their Answer and Counterclaim give the usual reasons for defense—"complaint fails to state a claim upon which relief can be granted." The Appellants also state the Court lacks jurisdiction in the dissolution of a public utility district and avers that such dissolution can only occur by a vote of the affected property owners. The Appellants question the validity of the purported annexation, stating it is without authority of law and that neither the Local Boundary Commission, nor the City of Anchorage had any right, either under the Constitution or the laws of the State of Alaska to do any of the purported acts and things stated by the City of Anchorage in their Complaint. They further declare that the City of Anchorage has usurped the proper governmental powers of the Public Utility District which is without warrant authority or sanction of law. The Board of Directors are unable to dissolve the Public Utility Dis-

trict as they have no authority to conduct such dissolution except under the laws pertaining to such dissolution, and in turn, questions the authority of the City of Anchorage to institute such proceedings.

In the Counter-Claim against the City of Anchorage, the Mayor, the City Councilmen, the City Clerk, the City Manager, the Fire Chief, Chief of Police, the Local Boundary Commission of the State of Alaska, and the Director of the Local Affairs office of the Governor of the State of Alaska are named as additional defendants. The Counter-Claim further states that on or before March 20, 1960, the Local Boundary Commission, together with the Director of Local Affairs, purported to exercise certain powers which resulted in a declaration of annexation of the said Public Utility District, and by exercising these powers the Local Boundary Commission and the Director of Local Affairs did not comply with any of the substantial or procedural requirements of law set forth in Title 16, Article 2, Alaska Compiled Laws Annotated, Cumulative Supplement, in that no petition for annexation was filed, no publication was made, no opportunity was given for citizens to object, no hearing was held, no election whatsoever was held, no votes cast, counted, canvassed, or declared—all of which does not comply with the applicable statutes of the State of Alaska.

Further, this usurption of governmental functions vested in the Fairview Public Utility District, No. 1, the interference by the City of Anchorage within the area known as the Fairview Public Utility District, No. 1, has caused irreparable damage of the Public Utility District, its officers, electors and property owners. A breakdown of local government, resulting in general confusion is alleged, there being no adequate remedy at law.

The Court is asked to add the parties named above, to restrain the City of Anchorage pending the litigation, to declare the annexation void, and requests costs and reasonable attorney's fees.

Statement of Fact

In February, 1960 the Local Boundary Commission, an appointed agency by the Governor of the State of Alaska, adopted a formal recommendation under the guise of a "proposed boundary change" which in effect annexed the entire area of the Fairview Public Utility District, Number One, a public corporation to the City of Anchorage, a municipal Corporation. After giving their report to the legislature, a resolution by the Committee of Local Affairs of the House of Representatives was introduced disapproving of this "boundary change." The House of Representatives passed by more than a 2/3's majority the resolution of disapproval. However, the Senate of the State of Alaska did not. Thereupon, the City of Anchorage, by City Council action, accepted the "boundary change" as valid annexation and on March 22, 1960 passed ordinance number 1389, officially confirming and accepting said annexation. Immediately thereafter the City of Anchorage exercised administrative jurisdiction and governmental authority within the Fairview Public Utility District Number One area.

This litigation is the result of the failure to resolve the claims and interests of these two conflicting municipal organizations.

Issues Presented

The issues presented by this litigation are as follows:

1. Was the purported annexation of the Fairview Public Utility District, Number One, to the City of Anchorage legal and in accordance with law?

2. Did the Court have the authority to appoint a receiver for the Fairview Public Utility District?

3. Did the City have the authority to commence municipal proceedings without an election showing consent by the people of the area affected?

4. Did the City of Anchorage have the authority to encumber the real and personal property of the peo-

ple in the Fairview Public Utility District, without their consent?

5. Are the statutes pertaining to the dissolution of any Public Utility District valid and in force?

Argument

Annexation of any area by compulsion, without a vote of the people concerned, is a matter of grave concern to any citizen. The sponsors of this litigation, the Alaskan Right to Vote League, Inc. feels every citizen bears a responsibility for advancing his own rights and that the violation of any citizens' rights is a violation of their own.

This case clearly represents the violation of every citizen's rights and particularly those guaranteed under the Constitution of the United States—the right to vote. To deliberately usurp the rights of others without due process of law is not only un-constitutional but an assault on the basic concepts of every American who believes he has the same rights under the Constitution of the United States as his next door neighbor, regardless of race, creed or color.

A case in the United States Supreme Court regarding a similar instance wherein the City of Tuskegee, Alabama by changing its boundaries, excluded certain portions because of the color of the inhabitants therein is almost an identical parallelism to the instant case. See *Gomillion* vs. *Lightfoot* Opinion No. 32, October term, 1960. In this case, the citizens were excluded and denied their right to vote. However, in a concurring opinion, Mr. Justice Whittaker redefines the case as eliminating the issue of color and placing the redefining of boundaries by an Act 140 of the Legislature of the State of Alabama as a act to abridge the "right . . . to vote," in the Fifteenth Amendment sense.

Let us go back a little into Alaskan history and trace the events leading up to this purported boundary change.

Prior to Statehood, the Territory of Alaska was an

undeveloped, sparsely populated area with large areas nothing more than wilderness. An Act of Congress created cities. For instance, Juneau and Fairbanks. Prior to 1912, Alaska didn't even have its own Legislature. Even the City of Anchorage was incorporated under Federal statutes, when it was nothing more than a railroad center.

In 1923 the Alaskan legislature was granted authority by the Federal government to enact general laws for the incorporation and self-government of Alaskan cities, that being the only type of government centers existing at that time.

In the Organic Act of 1884, Congress had imposed special limitations upon the powers of the Territorial Legislature providing for a county form of government "until it shall be submitted to and approved by the affirmative action of Congress" *Organic Act (37 Stat. 512)* Sec. 9: Sec 4-3-1, ACLA 1949. Quite naturally no county form of government was formed.

Undoubtedly, this restriction plays considerable emphasis upon the development of Alaskan cities, as authority had been granted for their development only. The hang-over of restrictive legislative powers probably channeled grooves in the minds of those either elected or appointed to guide the destiny of this State, so that any attempt to form a type of government which required Congressional approval was frowned upon. Hence the rule of cities became supreme.

It is a question of self-preservation as far as Juneau, Fairbanks, or the City of Anchorage is concerned. Once the City of Anchorage acquired a power, it grudgingly gave it away, and seldom without a great fight. Instead, the reverse is true. The City of Anchorage maintains it is a separate entity, above the reach of law, and immune to attack from any source, and proves this attitude repeatedly in its dealings with any of its sister cities or suburban communities—the City of Anchorage can do no wrong.

With the advent of World War II, many changes occurred. Transportation facilities, both by air and

by roads eased considerably the problem of lack of communication. And, with the settling of many areas by returning servicemen who, having been stationed in Alaska, brought their families, after the War. Population increased. Naturally, the settled areas attracted the incoming population who wanted services similar to those in the States which they had left.

Unfortunately, the grooves were too deeply etched and the pioneers within the City of Anchorage, through the City Fathers, refused to extend services to those who settled outside their city limits, on the basis that the land inside should be used. But the prices of that land were so high, many were forced to settle outside the established community. Almost by magic new communities sprang up, known as Mountain View, Spenard and Eastchester (now Fairview). Demands for roads, water, electricity, sanitation, police and fire protection were made to the established communities. Again, the City Fathers said that these public services would be extended on their basis—the land within the City must be purchased and at their prices.

See: Hearings before the Subcommittee on Territorial and Insular Affairs, House of Representatives, 84th Congress, 1st Session, pursuant to H. Res. 30 (Part 2, Serial No. 27, 1955), pp. 134-135.

In order to provide facilities, these communities outside the City of Anchorage formed cooperatives and furnished power. Lacking sufficient economic status to incorporate, the communities requested limited grants of power from the Alaskan legislatures. In 1949, and then in 1951, 1953, 1955 and 1957, the Alaskan legislatures granted these requests, expanding the powers until a quasi-municipal corporation, called a Public Utility District was defined.

First created in 1939, the powers granted to the Alaskan Public Utility District became greater than similar corporate bodies in the then 48 States. Therefore comparison of the names without defining the powers of the names—i.e. public utility district, water

district, etc.—is without standing and cannot be cited. For instance, Alaskan Public Utility Districts had the power to exercise the right of eminent domain; to build dams, reservoirs, power houses and structures, transmission lines, water works, telephone systems, light plants, hospitals, docks, warehouses, cold storage plants and fish canneries; to issue bonds and incur indebtedness for the acquisition or installation of public plants; to construct public utilities; to levy taxes to pay bonds; to levy and collect taxes upon all real and personal property and to expend the same in payment of the cost of conducting elections and the construction operation and maintenance of public improvements; to refund bonds issued; and to enforce the assessment of taxes by lien and foreclosure of property.

To these powers, the legislature subsequently added the authority to construct, maintain and operate garbage disposal facilities, park and recreation facilities, traffic and warning signals, street lights, facilities for controlling and preventing fires; to create, operate and improve roads, trails, walks, bridges, and drainage ditches, or to contract therefor; to own and operate public utilities or to grant franchises with reference to such utilities; to make ordinances providing for the exercise of these powers; to provide, by resolution or ordinance, for the public health; to prescribe by ordinance and under such rules and regulations as it may prescribe, for the grant of easements and for the renewal thereof; for the construction, installation and maintenance of any and all utilities, including but not limited to water and sewage lines, on public property, streets, and roads located within and under the jurisdiction of the district; to provide for sewer systems; to create local improvement districts and assess costs against benefited properties in the same manner as incorporated cities; and to enforce tax liens against personal or real property in the same manner as granted by law to municipal corporations and their common councils.

See: Title 49, Chapter 2, ACLA 1949, as amended and supplemented.

In reality what had happened, was the creation by the State Legislature of a type of government paralleling the county type of government in the then 48 States.

Then came the awakening of the City of Anchorage. In 1952 a change came over the City Fathers of the City of Anchorage. Where before no attempts at expansion were made, now having seen wherein the City of Anchorage was completely surrounded by communities, who, having once having asked for assistance and receiving none, were self-sufficient and did not want the City of Anchorage, the City began annexation programs.

("The opposition (to annexation) in part is traceable to the failure of the city (of Anchorage) during the boom to extend its facilities into the areas as they developed. This delay resulted in the extension of privately owned utilities and the organization of public utility districts." Folta, J. in the case of *In re Annexation to City of Anchorage* (DC Alaska, 1955), 15 Alaska 504, 509, 129 Fed. Supp. 551.

Carefully engineering piecemeal annexation of areas which resisted gerrymandering tactics, the City of Anchorage annexed Mountain View and Eastchester Flats. Little has been done to improve either area since the annexation maneuver by the City of Anchorage, although citizens within each area have gallantly fought for improvements.

Seven times the Fairview area voted against annexation to the City of Anchorage.

Any attempt on the part of any suburban areas to incorporate or expand further into the area of zoning and police protection, was bitterly opposed by the City of Anchorage; in the courts and on the floor of the Legislature.

Like sitting ducks, each area was prevented from flying the blind the City of Anchorage had built until

another area was needed to support the growing indebtedness of the City of Anchorage and then the area was "annexed" to provide as its share of the hunt, the tax valuations of the property within the annexed area which would support the demands of the City Fathers to up the valuation of the property within the center of the City of Anchorage.

Because of the many controversies involving this procedure, the 1957 Legislature completely revised the laws pertaining to annexation of territory to incorporated cities, by repealing Section 16-1-21 through 16-1-28, ACLA 1949 as amended: enacting Title 16, Article 2, Sections 16-1-29 through 16-1-29 (n) of the Code.

The First Session of the First Legislature of the State of Alaska, convening January 26, 1959 and adjourning April 16, 1959, and acting under the Constitution of the State of Alaska, did not consider in any manner as repealed the new annexation laws indicated above, but did further amend them in Chapter 103 of the Session Laws of 1959, at page 107, effective April 21, 1959, by revising subsections (2) and (3) of Section 16-1-29 (h), thus giving express recognition to the continued efficacy of the modified annexation laws.

Likewise, the 1957 Legislature amended Section 49-2-13 ACLA 1949, pertaining to the dissolution of public utility districts, specifically the manner of dissolution by a vote of the electors and protecting the contractual duties of the dissolved district.

Let us traverse back to the time of the Constitutional Convention, who met prior to statehood, at College, Alaska, in 1956. On the floor of that convention, the controversy of city and public utility district, counties and local government was bitterly contested. And a compromise was effected. An experiment in the type of government outside cities was promulgated.

Beginning with Article X of the Alaska Constitution, Section 2, the Convention provided that: "All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only."

In orderly fashion, the sections that follow provide for the creation of organized and unorganized boroughs, for the incorporation and government of cities and for the interrelationships which were to exist between these two forms of local self-government. In Section 12, Article X, provision was made with respect to the boundaries between these forms of government as stated:

> "Section 12. A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the Legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action."

And following Section 12, in Section 15, the disposition of existing non-city types of government was provided:

> "Special service districts existing at the time a borough is organized shall be integrated with the government of the borough as provided by law."

It is evident that an orderly, step by step regulated procedure, from Section 1 through Section 15, in just that order, was contemplated under Article X.

The only governments existing would be cities and boroughs. The Legislature would determine boroughs, their powers, their functions and how they were to be organized. The existing special service districts are to be integrated within the borough in a manner provided by the Legislature.

And, then, and only then, after all these changes had been effected, then changes in the boundary of "local governments" would be under the jurisdiction of the Local Boundary Commission as specified in Section 12, Article X of the Alaska State Constitution.

The references to "special service districts" in Section 15, Article X applies to public utility districts, school districts and health districts, there being no other "special service districts" in Alaska.

But this would all occur *after* (emphasis supplied) the legislature had passed the necessary legislation incorporating these areas into the boroughs.

Statehood, in becoming effective January 3, 1959, implemented the new Constitution and in Section 1 of Article XV of the Alaska Constitution we find this statement:

> "All laws in force in the Territory of Alaska on the effective date of this Constitution and consistent therewith shall continue in force until they expire by their own limitation, are amended or repealed."

The transitory provisions are also contained in the Alaska Statehood Act, Public Law 85-508, 85th Congress, July 7, 1958 (72 Stat. 339) which provides in Section 8(d) that:

> "Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska, shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, as thereafter modified or changed by the Legislature of the state. . . .

There has been no attempt by the State Legislature to repeal any of the laws pertaining either to annexation of territory to cities or to the dissolution of public

utility districts, but instead, by making a minor amendment, as indicated previously, has indicated its intent to keep these laws intact.

To presume that other than an orderly, transitional flow of governmental powers from Territory to State and from State to local government is possible is to abort the efforts of those who in constructing the Constitution of the State of Alaska provided procedures to safeguard the rights of the citizens therein.

Clearly, the Local Boundary Commission overstepped its authority. How could this happen? Let us review the affidavit of Gara Lyon, a member of the Local Boundary Commission in Cause No. 60-250, appealed to the Supreme Court of the State of Alaska. In detail, this Affidavit relates the unawareness of annexation procedures and the reliance upon George Shannon, then City Manager of the City of Anchorage, who was "more familiar with annexation procedures" to prepare a formula for adaptation by the Local Boundary Commission. Here we have the basis for the later recommendation by the Local Boundary Commission to annex a public corporation to a municipal corporation, authored by the City Manager of the municipal corporation who had seven times attempted to acquire the area by a vote of the people and had been rebuffed each time. Here was a golden opportunity to get around that frustrating block that had always succeeded in maintaining the status quo—the right to vote. By eliminating the voting of the people in the area concerned, any municipality could gobble up any other area by gerrymandering, annexing by recommendation of the Local Boundary Commisison or if the necessity demanded—allowing a vote.

To affirm this line of reasoning, let us compare the testimony of one Tom Moore, representing himself as an interested taxpayer at the Local Boundary Commission's Hearings at Anchorage the week-end of December 19-20, 1959. Again, the same men who filed the prepared affidavits by the City of Anchorage in this

instant case attended and discussed the annexation of Fairview to the City of Anchorage, and the procedures previously utilitized:

> Chairman: "Before we get into that, Mr. Moore, may I ask one question. The Fairview area you are speaking of, so the Commission will have a little background on it, have you ever voted for annexation? Has there ever been a vote taken on it or anything?
>
> Moore: Yes, actually we tried to annex the entire area and I say we, because I was instrumental in circulating some petitions and we were defeated as a whole. Then as a last recourse, for some of the people who owned property who desired better improvements and services which were available to them if we were in the city of Anchorage, reverted to piece-meal annexation. And I might say that in that case we, out of several districts, which were piecemeal annexed, by then we lost one, only by two votes. . . ."

And so, by the preparation of annexation procedures for the Local Boundary Commission who were not versed in same, by the City Manager of the City of Anchorage, the long long story of the compulsive annexation of the Fairview Public Utility District Number One was begun.

It is inconceivable that the Alaskan legislature deliberately violated the United States Constitution in accepting the recommendation of the Local Boundary Commission concerning the annexation, without a vote of the people affected. We prefer to think that the fact that no definite conclusions by the interpretive branch of our government, the U.S. Supreme Court, as to annexation procedures involving the lack of voting, precluded their arguments on the floor of the Legislature. Certainly the fact that a solid vote by both Houses of the State Legislature did not occur is reason to doubt the statements by the City of Anchorage in

their memorandums that the State Legislature by failure to deny the recommendation of the Local Boundary Commission, concurred in their decision. This is a rather insignificant manner of passing a law. It has usually been the custom for both houses to pass a bill, making it a law, subject to the governor's veto. Here we have one part of the State Legislature agreeing, and one part disagreeing, with no submission to the Governor. By no stretch of the imagination can one impose the dignity of "law" as readily understood by the average citizen wherein a bill is introduced in either House, debated, passed, sent to the other House, and eventually signed into law by the Governor, on this ignominious attempt to bypass the will of the people.

We challenge the ipso facto annexation of the Fairview Public Utility District Number One to the City of Anchorage as unconstitutional. We base our case, apart from the non-conformance to the State Constitution and to the existing laws of the State of Alaska, on the grounds that the citizens of the Fairview area are being denied their rights as guaranteed under the U.S. Constitution.

In *Hunter v. Pittsburgh*, 207 U.S. 161, citizens of Allegheny, Pennsylvania claims that the General Assembly of that State could not direct a consolidation of their city and Pittsburgh over the objection of a majority of the Allegheny voters. It was alleged that while Allegheny already had made numerous civic improvements, Pittsburgh was only then planning to undertake such improvements, and that the annexation would therefore greatly increase the tax burden on Allegheny residents. The case held that (1) there is no implied contract between a city and its residents that their taxes will be spent solely for the benefit of that city, and (2) that a citizen of one municipality is not deprived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of his city with another.

The *Hunter* opinion intimates that a state legislature may not be omnipotent even as to the disposition of some

types of property owned by municipal corporations, 207 U.S., at 178-181.

The Boundary Commission's purported authority is quite clearly challenged in *Nixon v. Herndon, 273 U.S. 536, 540*, which says, "Of course the petition concerns political action," but "the objection that the subject matter of the suit is political is little more than a play upon words." A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries.

In the matter of *Gomillion* v. *Lightfoot*, Opinion No. 32, October term, 1960, U.S. Supreme Court, the Justice delivering the opinion states that the Act 140 which the Alabama legislature passed did not "merely redraw the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries."

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

We submit the Rule of State Decisis must apply in the case of Wood vs. Gray (No. 41, Supreme Court of the State of Alaska) in that where a point of law has once been settled by decision, it forms a precedent which is not afterward to be departed from, or lightly overruled or set aside even though it may seem outdated. *14 Am. Jur. 283, et seq.*

And while the Parks case, No. 60-120, being a persuasive and not imperative case, has been relied upon by the lower Court, the decision in the Woods case supersedes.

Conclusion

We therefore pray this Court to reverse the judgment of the Superior Court, Third Judicial District and direct the entry of an order to reverse the purported annexation of the Fairview Public Utility District Number One, to set aside all attempts on the part of the City of Anchorage to inflict their desires upon the citizens within the Fairview area, in the way of governmental procedures, to return all the assets seized by the City of Anchorage to the Board of Directors of the Fairview Public Utility District Number One and all taxes collected in this interim period to be itemized and returned to the Board of Directors of the Fairview Public Utility District, and all records pertaining and belonging to the District be returned, and for whatever relief and equity the Court deems proper, including attorneys' fees and costs.

Respectfully submitted,

Pauline Truex,
Pro persona

Dated: April 27, 1961

APPENDIX VI

IN THE SUPREME COURT OF THE STATE OF ALASKA

No. 71

LAWRENCE HAWK, et al,
Appellants

vs.

FAIRVIEW PUBLIC UTILITY, DISTRICT NUMBER ONE, et al,
Appellees

CITY OF ANCHORAGE, a municipal corporation,
Appellees

On Appeal from the Superior Court of the State of Alaska Third Judicial District

BRIEF FOR APPELLANT

Jurisdiction

This case is before the Court on appeal from a final judgment of the Superior Court, Third Judicial District, dated July 29, 1960. See Rule 6, Rules of the Supreme Court of Alaska. Said final judgment dismissed appellant's complaint. Notice of appeal was timely filed on September 9, 1960 in accordance with Rule 7 of this Court's Rules.

Statement of the Case

Appellants, residents, taxpayers, property owners, business licensees and qualified electors, respectively, in the municipal corporation of the Fairview Public Utility District Number One in the State of Alaska, filed a Complaint for a Mandatory Injunction and other relief against the officers and directors of the said Utility District, requesting them to continue functioning as officers and directors and to require them to set up

and hold an election of new directors and officers of the Utility District. The basis for the Complaint lies in the refusal of said officers and directors to comply with law, particularly Title 49, Chapter 2, ACLA 1949, as amended and supplemented, as well as Section 29-2-9 and Section 29-2-10 ACLA 1949.

A Hearing on a Motion for Order to Show Cause on June 14, 1960 resulted in the Court agreeing with the facts, but delaying any decision until the Court could consider two other cases concerning the Fairview annexation. These cases No. 69 and 70 of the Supreme Court File, are presently on Appeal. Case No. 70 questions the authority of the Local Boundary Commission. Case No. 69, concerns the legality of annexation procedures wherein the right to vote is denied. These are separate cases and shall be considered same by the Sponsors, inasmuch as three separate points are to be decided any one of which does not necessarily involve the other two cases, although somewhat related.

The City of Anchorage, Appellees, filed a Motion to Intervene on the grounds that Cases No. 69 and 70 have common questions of law and fact with this action and should be decided before the relief sought by the Appellants could be granted. The Appellants opposed the Intervention on the grounds that the City of Anchorage has no lawful interest in the litigation, inasmuch as the property owners of the Fairview Public Utility District were requesting an election be held in accordance with law and that intervention by the City was a matter of interference. A lengthy memorandum concerning the right to intervene brings out a point worth mentioning, that laws in force prior to the Constitution of the State of Alaska remain in force during the transition period, unless repealed by the Legislature.

The reason for this complaint is further explained by an Answer filed by two of the Fairview Public Utility District Board Members who state that the other three defendant board members, William E. Moore,

Glenn H. Eagon, and Al Otter have failed to attend board meetings, and that one member is not legally a member of the Board due to his having failed to comply with the By-Laws of the Fairview Public Utility District Board as to residency requirements. From the Answer it is apparent that an attempt to cooperate with the City of Anchorage by a "prompt and speedy determination by the Superior Court of all outstanding legal issues created by the purported annexation of the PUD area to the City of Anchorage, including, inter alia, questions relating to the future conduct and business and affairs of the defendant PUD."

It is also apparent from the letters to the Presiding Judge in the case from the various counsels that the line of communication had failed and a delay in obtaining a decision was working adversely to the affairs of the Fairview Public Utility District, No. 1.

The decision rendered by the Superior Court on the 29th day of July, 1960 ignored the issues raised by the original complaint and interposed another statement which had not been brought into this particular case by declaring, in his decision concerning Case No. 60-267 in which he embraced all the cases: "the entire area within the boundaries of the Fairview Public Utility District Number One has been validly annexed to the City of Anchorage and the utility district as a matter of law was dissolved, except insofar as it might be necessary to wind up the affairs of the utility district." The Court further stated that there was nothing for the Court to decide in the proceeding and dismissed the case without costs to any of the parties, entering an order of dismissal.

Issues Presented

The issues presented by this litigation are as follows:

1. Do the laws pertaining to the dissolution of a quasi-municipal corporation, namely the Fairview Public Utility District Number One, remain in full force

and effect even though a different method of annexation was utilized?

2. Does the Superior Court of the State of Alaska have jurisdiction and legal authority to decree the dissolution of the Fairview Public Utility District, without an election held in compliance with existing statutes?

Specification of Errors

The lower Court erred as follows:

1. By erroneously dismissing the case without deciding the merits presented to the Court.

2. By failing to rule on the merits of the complaint.

3. In failing to rule on the manner in which the laws should be interpreted which was the original complaint, the Court ignored the need for an election of Directors, to carry out the affairs of the District, whether the annexation was valid or not valid.

4. The Court, in adding the question of validity of annexation, misconstrued the complaint and ignored the very real and necessary need for officers to complete the affairs pending before the Fairview Public Utility District Board, including the collection of taxes due at that time.

5. By assuming that dissolution takes place as a matter of law, without a vote of the people concerned, there has resulted a situation which the counsel for the Appellants predicted would happen—The Fairview Public Utility District has been destroyed as a functioning entity, simply by delay and inaction in the Courts.

6. In considering the cases cited by counsel for the City of Anchorage while persuasive and interesting, are not binding or imperative upon the Court.

7. Court erroneously construed the decision rendered in Case No. 60-120, entitled Park et al, plaintiffs vs. City of Anchorage, defendant, as imperative in rendering the opinion by the Court on July 18, 1960 in this instant case.

8. By failing to grant the Mandatory Injunction

to demand an election of the Fairview Public Utility District No. One against the preponderance of the evidence and contrary to applicable law.

Argument

The Court below decided this case upon the merits of the Parks case, No. 60-120, without determining the value of the enforcement of the laws already in force.

Appellants do not wish to make an issue of the various prejudicial areas involved in this case, preferring to remain at all times objective in their unique position, of being forced to defend their Constitutional rights—THE RIGHT TO VOTE.

While the pleadings, motions, memorandums, points and authorities filed by both counsels are worthy of attention, time has eliminated much of the need for considering these passe' documents.

In view of the recent decision by the Supreme Court of the State of Alaska, in the matter entitled, "Dissolution of the Mountain View Public Utility District No. 1 (Sidney J. Wood, Appellant, v. C. C. Gray, Appellee.) Opinion No. 41, dated February 24, 1961, the question of the authority of the judiciary in the dissolution of a public utility district has been settled. On Page 9 of this opinion, the Supreme Court indicates quite amply the procedure to be followed in the dissolution of a Public Utility District.

The Opinion clearly states that the judiciary has no authority to intervene in a matter which the legislature has already conferred upon a quasi-municipal corporation.

Appellants have read thoroughly the Opinion in the matter of appointment of a Receiver for the Mt. View Public Utility District by the Court and the reference to lack of legislative consent to judicial interference in statutes dealing with public utility districts. It is their opinion that the precedent has already been well established by the Supreme Court of Alaska.

However, in order to guarantee that a precedent con-

cerning future attempted annexations within this State shall be spelled out in clear-cut, readily understood language, the Appellants respectfully request the Supreme Court to make a decision on the points of law raised in this case.

To aid in the establishment of a precedent, Appellants wish to refer to Opinion No. 32 of the United States Supreme Court, dated November 14, 1960 concerning the City of Tuskegee, Alabama.

In this case, the opening statement by Mr. Justice Frankfurter is almost parallel with the conditions of the Fairview Public Utility District. By inserting the words pertaining to this case, such as Alaska, Fairview and City of Anchorage, one could readily perceive the exact parallelism between the two cases. That the citizens of Tuskegee who filed the complaint happen to be Negro is only incidental to the case. We do not wish to enter into the cause of segregation by citing the fact that the reverse of this situation happened in Alaska—to wit: white and Negro citizens of the Fairview Public Utility District were annexed to another area, WITHOUT THE RIGHT TO VOTE.

In this case several points were clarified which pertain directly to all annexation cases, as well as the Fairview annexation case.

We cite this case particularly because so many side issues are settled therein.

In the case HUNTER V. PITTSBURGH, 207 U.S. 161, it was determined that "a citizen of one municipality is not deprived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of his city with another." This specifically pertains to the instant case wherein the Court held that "having decided No. 60-267 no case exists in Case No. 60-505." Appellants aver that the matter of "due process of law" enters quite strongly into this case and dismissal without consideration of the points raised is violation of the 14th Amendment of the Constitution of the United States.

One phrase which applies most definitely to this case

is the discussion on applying out of context in disregard of variant controlling facts. Justice Frankfurter has this to say:

> "Particularly in dealing with claims under broad improvisions of the Constitution, which derive content, by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts Thus, a correct reading of the seemingly unconfined dicta of HUNTER and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases."

While this particular phase of Legislative power is not specifically mentioned in this Action, we feel that inasmuch as Case No. 60-267 will not be heard until after this case, due to the length of its preparation, the Appellants wish to lay the groundwork for a greater authority, namely the U.S. Constitution, which restricts the power of any State Legislature to do as they will with those express rights, specifically outlined in the document . . . including the right to vote.

We quote, again from Opinion No. 32 of the U. S. Supreme Court:

> "This line of authority conclusively shows that the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. The observation in GRAHAM v. Folsom, 200 U. S. 248, 253 becomes relevant: "The power of the

> State to alter or destroy its corporations is not greater than the power of the State to repeal its legislation."

To allay the fears of counsel for the Appellees that we, the Appellants may be attempting to drag in a Civil Rights issue, we wish to refer to the last page of the Opinion, wherein Mr. Justice Whittaker, in concurring stated:

> "I am doubtful that the averments of the complaint, taken for present purposes to be true, show a purpose by Act 140 to abridge Petitioner's "right .....to vote." in the Fifteenth Amendment sense. It seems to me that the "right.....to vote" that is guaranteed by the Fifteenth Amendment is but the same right to vote as is enjoyed by all others within the same election precinct, ward or other political division."

This line of reasoning removes the question of racial right to vote and places it on the broad plane where any American, no matter what race, color or creed is guaranteed the right to vote.

We hold dear our beliefs in the United States of America. It may seem incredible to those who may feel that by enjoying the phrase "professional" that laymen, of average education, should attempt to pick up the very difficult and complicated cases involving so many phases of Alaskan law and proceed with the case, without counsel.

There is a certain humbleness in our desire to carry this case through to completion. Our cause is so basic, so just, so earnest that we feel supremely confident that once the issues were presented, we would receive immediate assistance.

It is with deep appreciation we acknowledge the wonderful sustaining assistance from members of the legal profession all over the United States who, having heard of our plight, have offered their services, either

as our counsel or as amicus curiae. Their encouragement, correspondence and offer of briefs of similar cases have been of the greatest assistance.

This is no ordinary case. It is not small in content. We feel the whole future of the State of Alaska rests on the decisions made in these cases, for, if the rights of the individual citizens are ignored, then the vote of no confidence for the legislature and the officials purporting to be our leaders shall be given and the Exodus from this pioneer state shall begin.

Flaunting the established procedures set forth by the law under which this Country was founded is sufficient to create a sense of imbalance.

We are citizens first of the United States, then of the State, and then of the City or County or other area within that State. Whether it was correct or not for the City of Anchorage to annex another area which has successfully combatted the attempts seven times before is incidental before the overwhelming factor that being denied the right to vote is the most base of crimes against the U.S. Constitution under which we live.

Conclusion

We, the Alaskan Right to Vote League, Inc. respectfully request the Supreme Court of the State of Alaska to forthwith declare the necessity of an election in the Fairview Public Utility District Number One for the selection of proper directors who will continue the functions of this Public Utility District according to law.

Respectfully submitted,

Leonard J. Grau.
Pro Persona
Alaskan Right to Vote League, Inc.

Dated: April 15, 1961